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CLERK U.S. BANKRUPTCY COURT  
Central District of California  
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**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
LOS ANGELES DIVISION**

In re:

PROTOTYPE ENGINEERING &  
MANUFACTURING, INC.,

Debtor.

Case No. 2:17-bk-21018-RK

Chapter 7

**ORDER VACATING ORAL RULING  
GRANTING TRUSTEE'S MOTION TO  
APPROVE COMPROMISE OF  
CONTROVERSY AND AUTHORIZE  
PAYMENT TO AUCTIONEER AND SETTING  
FURTHER HEARING TO HEAR  
ADDITIONAL ORAL ARGUMENT**

Initial Hearing

Date: February 6, 2018

Time: 2:30 p.m.

Further Hearing

Date: **February 20, 2018**

Time **2:00 p.m.** (note: different time than  
initial hearing)

Place: Courtroom 1675  
Roybal Federal Building  
255 East Temple Street  
Los Angeles, California

This bankruptcy case came on for hearing on February 7, 2018 on the motion of  
Wesley T. Avery, Chapter 7 Trustee, to approve compromise of controversy with

1 Creditor Barry Bordbar and to authorize payment to auctioneer. Timothy J. Yoo, of the  
2 law firm of Levene, Neale, Bender, Yoo & Brill L.L.P. appeared for the Trustee.  
3 Theodore Stolman, of the law firm of Freeman, Freeman & Smiley LLP appeared for  
4 Debtor Prototype Engineering & Manufacturing, Inc. Maria Ternstrom, spouse of  
5 Creditor Jon Ternstrom, appeared, stating that she held a power of attorney for Mr.  
6 Ternstrom. Mr. Ternstrom filed a written objection to the motion on January 9, 2018, but  
7 did not appear at the hearing. The court declined to allow Mrs. Ternstrom to appear for  
8 her spouse, Mr. Ternstrom, because an individual representing himself and not  
9 represented by a lawyer must appear personally in a case before this court. See Local  
10 Bankruptcy Rules 9011-2(b) and 2090-1. After the court ruled that Mr. Ternstrom had to  
11 appear for himself, and not by an attorney-in-fact, Mrs. Ternstrom stated that he could  
12 not appear at the hearing in person because he was in the military. The court stated  
13 that he could have appeared by telephone in accordance with the court's telephone  
14 appearance procedures, which was also stated in the court's tentative ruling for the  
15 hearing posted on the court's website the day before the hearing.

16 After hearing from counsel, the court orally ruled that the motion should be  
17 granted because it appeared to the court that the compromise was within the  
18 reasonable business judgment of the Trustee to accept a payment of \$7,500 from  
19 Creditor Barry Bordbar, Debtor's landlord, for his claims for post-petition rent in  
20 exchange for Debtor's personal property assets which were to be auctioned, given the  
21 limited auction value of these assets estimated to net at auction of about \$50,100 to  
22 \$55,100 net and the administrative expense claim of the Creditor Barry Bordbar for  
23 post-petition rent in the amount of at least \$45,000 (\$15,000 per month for at least 3  
24 months). Of the amount of \$7,500 under the proposed compromise, \$4,985 would go  
25 to the auctioneer for his reasonable expenses in preparing for the auction, and the  
26 balance of \$2,515 would go to the estate. As noted by the Trustee, the estate has an  
27 additional \$13,000, and his statutory fee is estimated to be about \$2,800, and the  
28 administrative expense claims of his professionals are estimated to be about \$10,000 to

1 \$12,000, which indicate that the estate is or close to being administratively insolvent.  
2 The Trustee argued in his motion that there was no legitimate purpose for liquidating the  
3 estate assets desired by Creditor Barry Bordbar by selling them and turning over the  
4 proceeds to him since as of the date of the filing of the motion on December 20, 2017,  
5 no creditor had filed a proof of claim and Creditor Barry Bordbar had his administrative  
6 expense claim for postpetition rent. The court noted at the hearing that it considered  
7 Mr. Ternstrom's written objection and that it did not state any substantive grounds for  
8 objecting to the motion to approve compromise. Mr. Ternstrom's personal appearance  
9 in support of his objection to the motion to approve compromise was required under  
10 Local Bankruptcy Rule 9013-1(j), and the court may deem his failure to appear as  
11 consent to the granting of relief adverse to his position. After its oral ruling, the court  
12 directed counsel for Trustee to lodge a proposed order granting the motion.

13 After the hearing, the court had reservations about its oral ruling in that it had not  
14 known that the objecting creditor, Mr. Ternstrom, would be unable to personally appear  
15 at the hearing due to his military obligations since this was not mentioned anywhere in  
16 his papers and not corroborated by any evidence, such as a declaration under penalty  
17 of perjury, or that he was not aware that he could appear by telephone in accordance  
18 with the court's telephone appearance procedures and as a self-represented party, he  
19 may not have known of the court's practice of posting tentative rulings for its hearings  
20 on the day before. In his written opposition, he did not state specific substantive  
21 grounds for his objection to the motion, but requested a hearing on the motion for all  
22 parties to be heard.

23 After the Trustee filed his motion on December 20, 2017, several creditors,  
24 including Mr. Ternstrom, filed proofs of claim before the claims bar date of December  
25 26, 2017, which claims were not discussed by the Trustee in his motion, at the hearing  
26 or in any written reply to Mr. Ternstrom's objection since no written reply was filed. On  
27 or about December 22, 2017, Mr. Ternstrom filed a proof of claim in the amount of \$10  
28 million based on a personal injury cause of action pending in the United States District

1 Court for the Central District of California. On or about December 22, 2017, Creditor  
2 Cameron Witzler filed a proof of claim in the amount of \$10 million based on a personal  
3 injury cause of action pending in the United States District Court for the Central District  
4 of California. On or about December 22, 2017, Creditor Collette Carpenter as the  
5 administrator of the Estate of Clayton O. Carpenter, deceased, filed a proof of claim in  
6 the amount of \$15 million based on a wrongful death injury cause of action pending in  
7 the United States District Court for the Central District of California. These proofs of  
8 claim were filed on behalf of these creditors by Mary F. Schivo, of the law firm of Motley  
9 Rice LLC located in Mount Pleasant, South Carolina. On December 26, 2017, Barry  
10 and Molly Bordbar Family Trust filed a proof of claim for unpaid prepetition rents and  
11 loans in the amount of \$2,642,041. Thus, it appears that formally speaking, Mr. Bordbar  
12 is not a creditor, but his family trust with his spouse is the creditor in this case with both  
13 rent and loan claims, though he is the trustee of his family trust. On February 5, 2018,  
14 the California Franchise Tax Board filed a request for payment of administrative  
15 expenses for unpaid postpetition taxes for 2018. None of the proofs of claim filed after  
16 the Trustee filed his motion to approve compromise, and the creditors who filed these  
17 proofs of claim, were discussed by the Trustee in the motion or at the hearing, or by Mr.  
18 Ternstrom in his written opposition.

19 In deciding to grant the motion to approve compromise under Federal Rule of  
20 Bankruptcy Procedure 9019, the court must find that the Trustee has shown that the  
21 settlement is fair, equitable and reasonable under the circumstances by considering the  
22 following criteria stated in the case of . *In re A & C Properties*, 784 F.2d 1377, 1381 (9<sup>th</sup>  
23 Cir. 1986)(citations omitted): (1) the probability of success in the litigation; (2) the  
24 difficulties to be encountered in collection; (3) the complexity, expense, inconvenience  
25 and delay of litigation; and (4) the paramount interest of the creditors with deference to  
26 their reasonable views on the matter. It seemed to the court that the Trustee has met  
27 his burden of proof as to these factors, but upon further reflection, neither the parties  
28 nor the court addressed the change in circumstances as to the creditor body after the

1 motion was filed since when the Trustee filed the motion, the only creditor with a known  
2 claim was the postpetition rent claim of the landlord, and the paramount interest of  
3 creditors at this time of the filing of the motion was apparently only that of the landlord.  
4 However, this changed after the motion was filed because five creditors, including the  
5 landlord, actually filed claims, and that the claims of creditors other than the landlord  
6 exceed the landlord's claim, so it appears that the consideration of the paramount  
7 interest of creditors changed after the motion was filed, which has not been fully  
8 addressed. Mr. Ternstrom's claim of \$10 million alone exceeds the landlord's claim of  
9 \$2 million, though this is not to say whether each of these claims will be fully sustained  
10 in the end. See Federal Rule of Bankruptcy Procedure 3001(f) (properly executed and  
11 filed proofs of claim are prima facie evidence of the validity and amount of the claims).  
12 The creditors other than Mr. Ternstrom and the landlord have not expressed a view on  
13 the motion, though it does not appear that they have been served with the motion since  
14 the motion was filed and served before they filed their proofs of claim. It appears that  
15 the court should look at the circumstances of the case and settlement more closely in  
16 determining the fairness, equity and reasonableness of the settlement here in that the  
17 estate's assets are being transferred to an insider creditor as its principal, Barry  
18 Bordbar, is Debtor's president, at a relatively modest price of \$7,500, given the potential  
19 auction value of the assets of \$55,100 and that this appears to be unfair and  
20 unreasonable settlement resulting in a bargain sale of estate assets to the Debtor's  
21 insider in the eyes of at least one creditor, Mr. Ternstrom, who has a personal injury  
22 claim against the Debtor in pending litigation, and possibly it would seem the same way  
23 to other creditors having personal injury and wrongful death claims against the Debtor.

24 Thus, the court believes that it should reconsider its oral ruling granting the  
25 motion and hear additional argument at a further hearing at which Mr. Ternstrom and  
26 other creditors could appear by telephone, if not, in person, or by a licensed attorney at  
27 law authorized to practice before this court (the court will not allow an attorney in fact to  
28 appear for an individual party pursuant to the court's local rules, Local Bankruptcy Rules

2090-1 and 9011-2(b)). The court's telephone appearance procedures are posted on the court's website under Judge Kwan's webpage, but basically, telephone appearances must be arranged through CourtCall, an independent conference call agency, at (866) 582-6878, which charges the caller a fee for setting up the telephone court appearance.

The court has authority to reconsider its oral rulings before the written order is signed and docketed. 3 O'Connell and Stevenson, *Rutter Group Practice Guide, Federal Civil Procedure Before Trial*, ¶ 12:157 at 12-69 (2017) ("The judge retains power to change his or her mind and reverse or modify the ruling until such time as the order is filed. The judge may allow further oral argument before signing the order.") and ¶ 12:156 at 12-68 – 12-69 ("Although there are exceptions, a judicial order is normally effective *when filed and docketed*."), citing *Georcely v. Ashcroft*, 375 F.3d 45, 48 (1<sup>st</sup> Cir. 2004)(emphasis in original).

Accordingly, the court orders as follows:

1. The oral ruling of the court to grant the motion made at the hearing on February 6, 2016 is reconsidered and vacated.
2. A further hearing to consider additional oral argument on the motion is set for February 20, 2018 at 2:00 p.m. before the undersigned United States Bankruptcy Judge in Courtroom 1675, Roybal Federal Building, 255 East Temple Street, Los Angeles, California.
3. On or before 3:00 p.m. on February 9, 2018, the Trustee is ordered to serve by overnight mail copies of this order and the motion on the creditors who filed proofs of claim in this case, but who have not been previously served by the Trustee with the motion. These creditors who have not been previously served may file and serve a written response to the motion by February 19, 2018.
4. Parties wishing to be heard on the motion, including Mr. Ternstrom, must

1 personally appear at the hearing on February 20, 2018 as required by Local  
2 Bankruptcy Rule 9013-1(j) unless waived under Local Bankruptcy Rule 9013-  
3 1(j)(2). However, parties may appear by an attorney at law authorized to  
4 practice before this court pursuant to Local Bankruptcy Rule 2090-1, by  
5 telephone in accordance with the court's telephone appearance procedures  
6 posted on the court's website, and if self-represented, in person or by  
7 telephone.

8 5. At the hearing, the Trustee must address the court's concern about the  
9 paramount interest of creditors under the criteria of the case of *In re A &*  
10 *Properties* in light of new creditor proofs of claim filed after the motion was  
11 filed, and the parties objecting to the motion to approve compromise,  
12 including Mr. Ternstrom, must address why the proposed compromise is not  
13 fair, equitable and reasonable under the criteria of the case of *In re A &*  
14 *Properties* as stated above.

15 6. Any parties may file and serve a supplemental brief on the motion on or  
16 before February 19, 2018, including the Trustee and Mr. Ternstrom.

17  
18 IT IS SO ORDERED.

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25 Date: February 7, 2018



Robert Kwan  
United States Bankruptcy Judge